Date: 20080527

Docket: T-305-99

Citation: 2008 FC 679

BETWEEN:

THE DENÉ THA' FIRST NATION and CHIEF JAMES AHNSASSAY and CHARLIE CHAMBAUD, VICTOR CHONKOLAY, FABIAN CHONKOLAY, JOHN DEEDZA, GABRIEL DIDZENA, and FRED DIDZENA, BAND COUNCILLORS acting on their own behalf and on behalf of ALL OTHER MEMBERS OF THE DENÉ THA' FIRST NATION

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF INDIAN AND NORTHERN AFFAIRS

Defendant

REASONS FOR ORDER AND ORDER

LAFRENIÈRE P.

[1] The Plaintiffs seek leave to amend the Statement of Claim to include a claim of damages for failure by the Defendant (Crown) to provide agricultural assistance in accordance with Treaty No. 8 (Treaty 8). The motion is opposed by the Crown on both procedural and substantive grounds. For the reasons that follow, I conclude that the motion to amend should be granted.

Background

[2] On February 26, 1999, the Plaintiffs filed a Statement of Claim alleging that the Crown failed to ensure that the Plaintiffs received all the benefits they were entitled to under Treaty 8. The Plaintiffs alleged, in particular, that the Crown breached its fiduciary, contractual and treaty obligations by failing to distribute ammunition and twine to the Plaintiffs and their ancestors from 1900 to 1951. They also alleged that the Crown failed in 1950 to set aside sufficient Reserve lands for the Plaintiffs based on the terms of Treaty 8. In their prayer for relief, the Plaintiffs requested, among other things, a declaration that the Crown did not respect its promises to provide ammunition and twine, land entitlements "and various other promises and covenants", as well as general and punitive damages in excess of 5 billion dollars.

[3] The proceeding was ordered specially managed in September 1999 following a motion by the Crown. After pleadings were closed in January 2000, the case management judge, Madam Justice Eleanor Dawson, fixed a schedule for completion of the next steps in the proceeding. The parties were directed to exchange affidavits of documents by October 31, 2000, and to embark on examinations for discoveries commencing in November 2000.

[4] During the course of the examination for discovery of the Crown's representative held in March 2001, then counsel for the Plaintiffs asked the Crown to provide other provisions of Treaty 8 dealing with the Plaintiffs' entitlement to "two hoes, a spade and what have you". He also asked for a breakdown as to what was specifically provided under the said provisions to the Dené Tha' First Nation (Request #175). Crown counsel questioned the relevance of the requests to the issues set out

in the Statement of Claim, and took the matter under advisement. The Crown agreed to identify the treaty provisions (see Exhibit A to the affidavit of Colleen Doty sworn April 2, 2008), however, by letter from counsel dated April 30, 2002, refused to answer Request #175.

[5] On October 10, 2002, the Plaintiffs appointed new solicitors of record. Counsel for the parties advised Justice Dawson in a joint letter dated November 1, 2002 that there were only two unanswered undertakings arising from the examinations for discovery, namely Requests #90 and #91. On May 30, 2003, the parties provided a joint status report to the Court and confirmed that there were no outstanding undertakings in the action.

[6] The Plaintiffs once again appointed new solicitors of record in February 2004. The Plaintiffs' motion material is silent, however, as to what steps were taken subsequently to move the proceeding forward. A review of the entries in the proceedings management system reveals that Justice Dawson actively intervened on several occasions over the next two years by issuing case management directions and orders. In particular, at a case management conference conducted on October 27, 2006, she fixed the following schedule based on the agreement of the parties:

(a) April 30, 2007: Both parties will have their document production complete.

(b) September 30, 2007: The Plaintiffs will complete their discoveries of the Crown.

(c) October 1, 2007: The Crown will begin examinations for discovery of the Plaintiffs and be completed by the end of March 2008.

(d) March 30, 2008 to March 30, 2009: Both parties retain and instruct experts and exchange expert reports. Both parties will address any interlocutory matters.

(e) March 30, 2009: Both parties will file pre-trial material and trial dates will be obtained.

[7] The Plaintiffs now move, almost eight years after this action was instituted, for leave to amend their Statement of Claim by adding three new paragraphs: 1(a), 26 and 27. The first paragraph is an additional claim for damages for the alleged breach of various legal obligations relating to the failure by the Crown to provide agricultural assistance. The second paragraph repeats that various obligations were breached by not providing agricultural assistance from 1900 to 1999. The third paragraph alleges that the Plaintiffs tried to farm reserve lands but that no assistance was provided such that, by 1954, only 190 acres of reserve lands were under cultivation.

Analysis

[8] The test in determining whether amendments to pleadings ought to be allowed is now well established. In *Canderel Ltd. v. Canada,* [1994] 1 F.C. 3, the Federal Court of Appeal stated that an amendment should be allowed "at any stage of an action," subject to three provisos: (a) the amendment must be made for the purpose of determining the real questions alive between the parties; (b) the amendment would not prejudice the opposing party in a manner not compensable with costs; and (c) the amendment must serve the interests of justice. In short, an amendment to a pleading should be allowed absent serious prejudice to the opposing party.

[9] It is also well settled that amendments based on discovery which refocus and particularize points in controversy are usually considered to facilitate the trial of an action and to help determine

the real points in controversy: see *Hoechst Marion Roussel Deutchland Gmbtt v. Adir et Cie* (2000), 190 F.T.R. 233, 2000 CarswellNat 967 (T.D.). Moreover, the existence of a possible time bar, including a statutory time bar, is not a reason to curtail an amendment.

[10] The Crown submits that the Plaintiffs have failed to adduce any facts in support of the Plaintiffs' claim for agricultural assistance. However, on a motion for leave to amend, a party need not prove its case. Rather, the Court must assume that the facts pleaded are true, and deny an amendment only in a plain and obvious case where the situation is beyond doubt.

[11] The Crown further submits that the claim for agricultural assistance raises new and broad causes of action that do not arise out of the same facts as already pleaded. The Plaintiffs were certainly less than precise in drafting their original pleading, focusing almost exclusively on the ammunition and twine provisions of Treaty 8. However, paragraph 1(a) of the Statement of Claim is broadly worded and encompasses other promises and covenants in Treaty 8. The Plaintiffs' proposed amendments must accordingly be read in their entire context, as part of the Statement of Claim.

[12] The proposed amendments are not vague or unclear. At paragraph 6 of her affidavit, Ms. Colleen Doty, a Litigation Project Manager employed by the Department of Indian Affairs and Northern Development, states that further research will be required if the amendments are allowed. She indicates the government records have been identified for review for relevance and materiality.

In the circumstances, I am satisfied that the Crown is familiar with the additional claim being advanced by the Plaintiffs, and knows the case it has to meet.

[13] The Crown also submits that the Plaintiffs have failed to provide any explanation for the substantial delay in seeking leave to amend and that allowing the amendments at this late stage of the proceeding would delay an expeditious trial, to the Crown's prejudice. Generally, any proposed amendments that raise new issues, require further discoveries and upset the established timetable should be discouraged.

[14] The Rules bearing on amendment ought to be interpreted and applied in light of Rule 3, so as to secure a just, expeditious and inexpensive determination of a proceeding on its merits. Further, case management was designed to identify and define issues in dispute and to reduce delays, costs and unnecessary pre-trial activities. As long as there is a cause of action which would not plainly and obviously be struck out as futile, the amendment ought to be allowed, if it can be made without prejudice to the other side.

[15] In the particular circumstance of this case, the proposed amendments do not cause any serious prejudice to the Crown that could not be compensated by an order of costs. I note that the proceedings are still at the early stage of discovery despite the fact that the action was commenced in 1999. The delay occasioned by additional documentary and oral discovery is relatively minor in light of the protracted history of the proceeding.

[16] Ultimately, this motion boils down to a consideration of simple fairness, common sense and the interests of justice. The proposed amendments involve the same parties, the same treaty and the same allegations of breach of fiduciary, contractual and treaty obligations. It would serve no useful purpose to require the Plaintiffs to bring a separate action to advance their claim.

[17] Finally, although there are some irregularities in the Plaintiffs' motion material, the Crown does not appear to have been misled or otherwise prejudiced as a result. In the circumstances, the deficiencies have been overlooked in disposing of this motion.

[18] Consequently, in light of the above reasons, the motion will be granted, with costs to the Defendant in any event of the cause, and without prejudice to the Crown's right to bring a motion for costs thrown away, if any.

ORDER

THIS COURT ORDERS that the motion is granted, with costs to the Defendant in any event of the cause.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-305-99
STYLE OF CAUSE:	THE DENÉ THA' FIRST NATION ET AL. v. HMQ

MOTION IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ORDER AND ORDER:	LAFRENIÈRE, P.
DATED:	May 27, 2008

APPEARANCES:

Will Willier	FOR THE PLAINTIFFS
Linda Fleury Sherry Daniels	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Willier & Company Barristers & Solicitors Tsuu T'ina, Alberta	FOR THE PLAINTIFFS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANT